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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FRANCES SEGHERS
VICE PRESIDENT
FEDERAL AFFAIRS

August 23, 1993

William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M St. NW
Washington, D.C. 20554

RE: Implementation of Sections 11
and 13 of the Cable TV
Consumer Protection and
Competition Act of 1992

Horizontal and Vertical
Ownership Limits, Cross-
Ownership Limitations and
Antitrafficking Provisions

MM Docket No. 92-264

Dear Mr. Caton:

Attached please find an original and 14 copies of the comments of the Motion Picture Association of America (MPAA) in the above-referenced docket. These comments are in response to the FCC's Further Notice of Proposed Rulemaking regarding horizontal and vertical ownership limits, cross-ownership limitations and antitrafficking provisions for cable television.

If you have any questions, please contact me.

Sincerely,

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SUMMARY OF COMMENTS OF THE MOTION PICTURE ASSOCIATION
OF AMERICA IN MM DOCKET NO. 92-264
August 23, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MPAA continues to support the Commission's proposal to impose a national subscriber limit of 25 percent of homes passed and to attribute cable system ownership based on the same criteria used in the broadcast context (Section 73.3555 of the Commission's Rules, Note 1).

We strongly oppose a higher subscriber cap. Greater concentration is not a precondition for the creation of new programming services or deployment of advanced cable technologies.

We also oppose subtracting from a cable operator's "homes-passed" total the number of homes passed by systems subject to "effective competition" or homes passed by a competing program distributor. The existence of competition may be irrelevant to the question of whether programmers are effectively foreclosed from local markets due to cable's dominance.

The Commission should establish jurisdiction over horizontal concentration matters by requiring appropriate certification. The rules should be reviewed not less than every five years.

MPAA urges the Commission to adopt our proposal that no cable operator should be permitted to dedicate more than 20 percent of its activated channels to programming services in which it has an ownership interest of 15 percent or greater. This is a lower channel cap, but a higher attributable interest standard, than proposed by the Commission. We believe our proposal better balances the interests at stake.

The Commission should count all activated channels for purposes of establishing the percentage count. The Commission should defer setting a channel limit at which the channel cap would be removed.

We concur with the Commission's determination to grandfather existing programming interests of cable operators. We oppose exempting "new" programming services from channel occupancy caps. We do not oppose exempting "minority-controlled" services from such caps, but we strongly oppose exempting services that are "minority-oriented" because this thrusts the Commission into content determinations that are best avoided.

The Commission should retain jurisdiction over these matters. It could require each cable operator to certify its compliance with the vertical integration rules at the same time that the operator makes its annual EEO certification.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Sections 11 and 13)	MM Docket No. 92-264
of the Cable Television Consumer)	
Protection and Competition Act of 1992)	
)	
Horizontal and Vertical Ownership)	
Limits, Cross-Ownership Limitations)	
and Anti-Trafficking Provisions)	

TO: The Commission

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA")¹ hereby respectfully submits its comments in response to the "Further Notice of Proposed Rulemaking" ("FNPRM")² in the above-referenced proceeding.

In the "Further Notice," the Commission seeks comment on specific proposals for limits on horizontal concentration and vertical integration in the cable television industry. MPAA

¹ These comments represent the positions of Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer, Inc.; Paramount Pictures Corporation; and Universal Studios, Inc. on the matters addressed. Twentieth Century Fox Film Corporation does not participate in these comments. Warner Bros., a division of Time Warner Entertainment Company, L.P., does not support these comments.

² FCC 93-332 (rel. July 23, 1993).

believes that such prophylactic restrictions on the market power of the cable industry in the programming acquisition marketplace are needed, and we earlier offered the Commission a series of specific recommendations³. At this time, we reiterate our support for those earlier-proposed horizontal and vertical limits. We believe that our proposals achieve a proper balance between the First Amendment values of promoting ownership and programming diversity, and the public interest in promoting economies of scale in cable system operations and desirable levels of cable industry investment in new programming.

I. Horizontal Concentration

We continue to support the Commission's proposal to impose "a national subscriber limit of 25% of homes passed and to attribute cable system ownership based on the same criteria that is (sic) used in the broadcast context."⁴ A 25 percent limit on horizontal concentration would not require divestiture of any existing cable operations, and it would give all but the very largest cable operator ample opportunity to expand their service areas.⁵ We

³ See Comments of MPAA in MM Docket No. 92-264, dated Feb. 9, 1993.

⁴ FNPRM at para. 134.

⁵ The second-largest cable multiple system operator reaches about 13 percent of all U.S. cable subscribers. The third, fourth and fifth largest MSOs each reach between five and six percent of subscribers, according to

believe, however, that 25% is the absolute outer limit of tolerable concentration and even with this cap in place would urge the Commission to reexamine this issue should two or more multiple system operators approach this ceiling.

The homes-passed measure is the most stable and readily ascertainable measure of cable's market reach and potential power in the program acquisition marketplace. The broadcast attribution criteria are a reasonable indicator of the ability of a stakeholder in a cable system to influence the system's programming acquisition decisions.

We strongly oppose a higher subscriber cap. There are no compelling public interest reasons for a higher number, and certainly none that outweigh the diversity goals established by the Congress. Greater concentration is clearly not a precondition for cable operator investment in new programming services⁶ or deployment of advanced cable technologies.⁷

industry census counts.

⁶ A number of cable operators, none of whom currently serves more than six percent of all U.S. cable subscribers (such as Comcast, Hearst, Viacom, Landmark and others) have made and continue to make significant investments in cable programming services.

⁷ Cable industry leadership in the installation of fiber optics and the move toward digitization and signal compression is not limited to the very largest MSOs. Companies such as Continental, Comcast, Cox and Viacom, none of whom accounts for more than six percent of all subscribers, have also announced commitments totalling hundreds of millions of dollars to these technologies. As the Commission suggests, regional, rather than national concentration, appears to be the most important factor in promoting such

Some cable operators argue that a higher cap can be justified because "extensive subscriber penetration is not essential to the success of a new programming network...."⁸ Yet many cable-affiliated programmers -- including those that currently reach the vast majority of cable homes -- have elsewhere argued that the operation of the must-carry rules is inimical to their financial success because must carry signals displace cable services on systems with limited channel capacity.⁹ While this may be true, it is readily apparent that the risk of market foreclosure (and financial failure) for unaffiliated programmers in the absence of strong horizontal and vertical ownership rules is far, far greater than the risk to cable-affiliated programmers of harm from the operation of the must-carry rules. If cable operators concede that those who already have "extensive subscriber penetration" are harmed by must-carry, they must concede that those who are foreclosed from "extensive subscriber penetration" because unaffiliated operators won't carry them are even more deeply wounded.

investments. Neither the Commission nor MPAA propose regional ownership limits.

⁸ FNPRM at para. 144.

⁹ It is also significant that the programming services said to have had "great success with penetration levels of less than 30% to 40%" [FNPRM at n. 128] are all vertically integrated. It is virtually impossible to find an independent programming service that can sustain itself with such low penetration.

We oppose the Commission's proposal to calculate compliance with national subscriber limits by "subtracting the number of homes passed by cable systems in areas where 'effective competition' -- as defined under the 1992 Cable Act -- is established."¹⁰ The statute does not mandate the Commission to apply this definition for the purposes of measuring horizontal concentration. Indeed, while this definition may be useful in determining whether consumers are getting competitive rates from their cable operator, it appears to be irrelevant to the question of market power in the program acquisition marketplace. The definition is also inconsistent with the idea that "homes passed" is the appropriate base against which the subscriber cap should be applied for purposes of determining an operator's power in programming acquisition. Permitting a cable operator to expand its national reach because of its failure to attract significant subscriber penetration (i.e., less than 30 percent of homes passed) in certain markets rewards bad service while compounding the market foreclosure problem for unaffiliated programmers. Even if the definition were limited to the "50/15" requirement, if an unaffiliated programmer has potential access to only 50 percent of homes in a market through one or more "competing distributors," and in fact cannot reach more than 15 percent of homes through such distributor(s), then that market remains effectively foreclosed to the unaffiliated programmer.

¹⁰ FNPRM at para. 152.

We also oppose any alternative definition of "effective competition" based upon whether the home is "passed by a competing program distributor" because (i) that "competing" distributor could be owned, in whole or in part, by the cable operator, and (ii) that second distributor may not provide a meaningful alternative distribution channel for the unaffiliated programmer.¹¹

We believe the Commission should establish jurisdiction over horizontal concentration issues. The simplest means of monitoring and enforcement would be to require every cable operator that, now or in the future, exceeds 20 percent of homes passed, to file a certification with the Commission in the event of any transaction or system extension that would increase its homes-passed count.¹² The Commission should also establish rules to entertain complaints that make a prima facie case that an operator has exceeded the 25 percent cap. The Commission should establish reasonable standards for temporary waivers of de minimis violations occasioned by an acquisition or system extension, but should require expeditious divestiture for the operator to come into compliance.

¹¹ Today's home satellite dish (HSD) industry, for example, is arguably a "competing program distribut[ion]" medium for virtually every home in the continental United States, but its market penetration in most areas is de minimis.

¹² The Commission should establish, on an annual basis, a reasonable consensus figure on how many homes are passed by cable in the U.S. This could be done, for instance, by averaging the figures from two or more respected sources, such as A.C. Nielsen and Paul Kagan.

We strongly support Commission review of its horizontal concentration rules not less than every five years. Many factors suggest that the industry will see growing concentration, including the adverse impact of new cable rate regulation rules on smaller system operators and the financial demands of technical upgrades in coming years. Therefore, the Commission should regularly reevaluate the applicability of these rules to this dynamic industry.

II. Vertical Integration

MPAA has previously proposed that no cable operator should be permitted to dedicate more than 20 percent of the activated channels on any of its systems to programming services in which it directly or indirectly has an ownership interest of 15 percent or greater. The Commission now proposes a more generous channel cap -- 40 percent plus additional channels meeting specified criteria -- and a tighter attribution limit (five percent). We urge the Commission to adopt the earlier MPAA proposal. It is critical in particular that the channel cap be kept to the lower limit in order to insure that there is diversity of voices in programming cable channels.

The adverse effect of a 40 percent channel cap on programming diversity becomes readily apparent when the Commission's proposed rules are applied to typical cable systems owned by Telecommunications, Inc., the nation's largest cable operator. Today,

67 percent of TCI's cable systems have 36 channels or fewer, and 87 percent have 54 channels or fewer.¹³

As shown in Attachment A hereto, if one were to apply the Commission's rules as proposed (including certain minority and local/regional exemptions, and assuming certain must-carry requirements) to a 36-channel TCI system, it would be possible for a substantial number of TCI systems to comply with the proposed rule while carrying no unaffiliated programming networks. If the proposed rules were applied to a 54-channel TCI system, a substantial number of TCI systems could comply with the proposed rule while carrying as few as five unaffiliated programming networks.¹⁴

This demonstrates why the MPAA proposal for a 20 percent channel cap and a 15 percent attribution rule strikes a better balance. An examination of the marketplace will demonstrate that there is no shortage of investors unaffiliated with cable MSOs who are willing to invest in new cable programming services. A 40% channel cap is not necessary to ensure the development of new cable

¹³ While TCI has announced an ambitious program to upgrade its systems' channel capacity, these plans are purely speculative and will take many years to implement. The rules the Commission adopts must be relevant to the marketplace as it exists today and will for the foreseeable future. Appropriate adjustments can be made in light of marketplace changes as they occur.

¹⁴ It should be noted that the results would be the same whether the Commission used the five percent attribution rule it proposes or the 15 percent attribution rule proposed by MPAA in its original comments.

programming services. To the contrary, it is likely to reduce the chances of successful development of independent services. It should also be noted that the vast majority of cable operators would be able to invest in programming services on their systems under the 20% cap.

We agree that the Commission should count all activated channels, including pay-per-view, pay-per-channel, and each channel of multiplexed services, for purposes of establishing the activated channel count. We also agree that the Commission should defer setting a maximum channel capacity measure beyond which the vertical integration limits would not apply. It would be premature to determine how these channel limits would apply in a video-on-demand or switched-video environment, since such technological offerings are only now in the experimental or prototype stage.

We concur with the Commission's determination to grandfather existing programming interests of cable operators. However, we oppose exempting "new" programming services from channel occupancy caps for any period of time. To do so would beg definitional difficulties in establishing whether a program service is "new" (a change in ownership? a change in name? a change of some minimum percentage in the programming schedule of an existing network? a "new" multiplexed network?). Moreover, as a practical matter, it is extremely unlikely that any cable operator would make an equity investment in a "new" programming service knowing that divestiture

would be required within a fixed period of time, and the Commission need not invite the inevitable flood of waiver requests that would result.

While we do not take a position exempting "minority-controlled" programming services from this rule, we would strongly oppose exempting services based on programming content, such as services that are "minority-oriented" or channels determined to provide local or regional programming. The Commission would face endless proceedings over how such an "orientation" should be defined, and would find itself involved to an unparalleled degree (in the modern era, at least) in programming content determinations that are best avoided. The Commission would find itself in the situation of judging whether particular programming is targetted to minorities or to local audiences. Congress made adequate provision in the Cable Act for ensuring the availability of local programming on cable networks when it adopted the must-carry provisions. The Commission should not now, on the basis of programming content, attempt to extend those protections in a manner that would be detrimental to nonaffiliated program services, thus leading to a reduction in the diversity of independent programming voices in cable services.

While the Commission proposes to retain responsibility for monitoring and enforcing compliance with the channel occupancy limits, it suggests no mechanism for doing so. We agree that to enforce only on the basis of complaints would be inadequate.

In the interest of simplicity, the Commission might require

that each system certify its compliance with the vertical integration rules (with adequate substantiation appended) at the same time as it makes its annual certification of compliance with the Commission's equal employment opportunity requirements pursuant to Section 634(e)(1) of the Cable Act. The certification should include a table listing how each activated channel is used and requiring an appropriate identification of any programming in which the operator owns an attributable interest as defined by the Commission.

III. Conclusion

We urge the Commission to adopt the limits on horizontal concentration and vertical integration that we have proposed. These prophylactic measures should promote diversity in programming sources while minimizing the level of regulatory oversight required of the Commission, and will still leave the

vast majority of the cable industry with ample room to grow and invest in system improvements and new programming.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.

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DATED: August 23, 1993

AVAILABLE CHANNELS FOR UNAFFILIATED NETWORKS ON CERTAIN CABLE SYSTEMS WITH A 40 PERCENT CHANNEL LIMIT

For purposes of this presentation, we assume that the Commission rules that a cable operator may not own an attributable interest in programming services occupying more than 40 percent of its activated channel capacity. We assume further that the Commission adopts its exemptions for (i) programming controlled by or oriented to minorities and (ii) local or regional programming services. We also assume carriage of commercial, public broadcast, and PEG stations as mandated by federal law and/or local franchise agreements (the figures used for PEG stations are estimated averages).

As used below, the term "affiliated networks" refers to programming services in which the particular cable operator has an attributable interest; for purposes of this demonstration, we assume a five percent interest, but the results would likely be the same if a 15 percent figure were used.

I. A TCI-owned 36-channel system

Commercial television stations:	12
Public broadcast stations:	3
PEG access channels:	4
<u>Affiliated networks:</u>	14
Black Entertainment Television	1
Local/regional sports:	1
Local/regional news:	<u>1</u>
TOTAL:	36
<u>Available channels for unaffiliated networks:</u>	<u>0</u>

II. A TCI-owned 54-channel system:

Commercial television stations:	18
Public broadcast stations:	3
PEG access channels:	4
<u>Affiliated networks:</u>	21
Black Entertainment Television	1
Local/regional sports:	1
Local/regional news:	<u>1</u>
TOTAL:	49
<u>Available channels for unaffiliated networks:</u>	<u>5</u>